

Service Date: March 22, 1989

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

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IN THE MATTER Of The Application	)	UTILITY DIVISION
by the MONTANA POWER COMPANY for	)	
Authority to Increase Rates for	)	DOCKET NO. 88.6.15
Electric and Natural Gas Service.	)	

IN THE MATTER OF The 1988 Annual	)	
Compliance Filing for Electric	)	
Avoided Cost Based Rates for	)	DOCKET NO. 88.7.26
Public Utility Purchases from	)	
Qualifying Facilities by the	)	
Montana Power Company.	)	

IN THE MATTER Of The Complaint of	)	
Boulder Hydro Limited Partnership,	)	DOCKET NO. 88.8.25
Complainant,	)	
vs.	)	
Montana Power Company,	)	ORDER NO. 5360c
Defendant.	)	

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FINAL ORDER ON MOTIONS  
AND PROCEDURAL ORDER  
BACKGROUND

1. On February 1, 1989, the Montana Power Company (MPC) mailed its rebuttal testimony in these proceedings, consistent with the procedural order in this docket, dated September 2, 1988 (as amended)

2. On February 8, 1989, the Commission received a Motion to Strike, Or In The Alternative, Motion for Continuance, filed on behalf of the Northern Plains Resource Council (NPRC). NPRC contended that certain portions of MPC's rebuttal testimony went beyond the proper scope of rebuttal, and should be stricken. In the alternative, NPRC requested that the hearing in this proceeding, scheduled for February 22, 1989, should be continued. If the hearing were continued, NPRC also requested that the Commission establish a schedule permitting full discovery and an opportunity to file response testimony.

3. On February 9, 1989, the Commission received a Motion to Vacate Hearing and Strike Portions of Testimony filed by the Montana Consumer Counsel (MCC). MCC also contended that the MPC rebuttal testimony was far beyond the appropriate scope. MCC requested that the Commission vacate the scheduled hearing and establish a new procedural schedule allowing for both discovery and response testimony by intervenors. MCC contended that regardless of the Commission action on the hearing schedule, the Commission should strike those portions of MPC rebuttal testimony relating to revised depreciation studies.

4. On February 10, 1989, the Commission received a Motion to Continue Hearings and for Leave to Submit Further Rebuttal Testimony, from the large-user intervenors. The large-users contended the hearing should be continued in its entirety, and that an opportunity should be provided for further testimony by intervenors.

5. On February 13, 1989, the Commission received the response of MPC to the above-described motions. MPC agreed that the hearing should be vacated, but argued that it was “not convinced” that a new round of testimony was needed, and that additional discovery would suffice. Further, MPC also contended that either the hearing should proceed in the natural gas portion of the docket, or an additional natural gas interim rate increase should be allowed. MPC stated that if additional testimony is allowed, the Commission should “be very careful in scrupulously keeping the additional testimony to only the issues which require additional testimony,” and that MPC be afforded the opportunity to provide additional rebuttal. MPC also suggested that any new procedural schedule include a time certain by which a final order be issued. Finally, MPC stated that the MCC motion to strike the depreciation study should not be granted. According to MPC, the study does not represent a change in the methods of analysis, but only an update of the numbers contained therein. These numbers are based upon year end 1987 plant in service, thus matching the test period in this proceeding. Further, by way of additional discovery, MCC will be given a full opportunity to investigate the updated depreciation costs.

6. On February 14, 1989, the Commission voted to vacate the scheduled hearing in this docket in its entirety. The existing procedural schedule was suspended, and parties were encouraged to continue their discovery efforts. A prehearing conference was scheduled for February 21, 1989, and a hearings examiner was appointed to preside over this conference.

7. On February 24, 1989, a Proposed Order on Motions and Procedural Order was issued by the hearings examiner. Exceptions to the proposed order were filed by the

Montana Consumer Counsel. A response to these exceptions was filed by MPC. These exceptions are addressed in paragraphs 12-19 below.

#### DISPOSITION OF PENDING MOTIONS

8. Although the hearing was vacated in its entirety, several pending matters contained in the above-described motions still remain to be resolved. At this time, the Commission expresses no opinion upon the propriety of issuing a separate interim order for the gas portion of this docket. Many of the issues concerning gas revenue requirements appear to be closely intertwined with those on the electric side. It would be inefficient to proceed with separate hearings at this point. The Commission expects that MPC will make a separate request to the Commission for any additional relief on the gas side, if such relief is sought.

9. The Commission agrees with the movants that an additional opportunity should be provided for response testimony after full discovery. The changes found in MPC's rebuttal are very significant, and go to the heart of this proceeding. Allowing only discovery and "live rebuttal" would not ensure the thorough analysis and review that the Commission believes is required for a proceeding of this magnitude. Indeed, given the complexity of the "new" proposals in MPC's rebuttal, the Commission believes that full discovery with another opportunity for testimony may be required to ensure a fair process. Of course, MPC must also be granted an opportunity to "rebut" this additional testimony (as should all parties).

10. MPC would like the Commission to specifically define those issues which may be addressed by additional testimony, i.e., those issues which are "new." The Commission specifically declines to make such a determination at this point, primarily

because of the complexity of the issues involved. Such a determination will better be made on a case-by-case basis, if necessary. Additional response testimony by intervenors must be limited to “new” matters raised in MPC’s rebuttal. As a general guideline, matters which may have been addressed in previous testimony filed with the Commission may not now be the subject of this next round of testimony. All of the parties are admonished that any challenges to the scope of filed testimony will be carefully considered, with a focus upon further narrowing the issues to be addressed. This also applies to MPC and its additional filing of rebuttal testimony.

11. Initially, in the proposed order, the hearings examiner declined to accept MPC’s request that a final date be set by which a final order should be issued. It was noted that under normal circumstances, such a requirement exists by virtue of the nine month provision found in § 69-3-302, MCA. Although MPC indicated that it would waive this requirement until June 30, 1989, it was unlikely that a final order would be issued by that date. See Proposed Order on Motions and Procedural Order, February 24, 1989, at paragraph 11. MPC has since indicated that it would further waive the application of the nine month provision to August 14, 1989, if the Commission would commit to issuing a final order by this date. The Commission believes that it will issue a final order in this docket by this date. It is, however, important to note that MPC’s waiver only extends to the electric portion of this proceeding.

#### Exceptions to Proposed Order

12. In the proposed order, the MCC’s motion to strike was denied without prejudice, and a separate procedural schedule was established for consideration of the depreciation issue. See Proposed Order, paragraph 10. The Commission also requested

that MPC file testimony relating to the recent tax settlement with the state of Montana. Proposed Order, paragraph 12. On exceptions, MCC contested both of these actions.

13. In its exceptions, MCC points out that at the prehearing conference on February 21, 1989, counsel for MPC stated that the depreciation expenses pursuant to the new study would be booked beginning in 1989. As the test year in this proceeding is calendar 1987, MCC asserted that the new depreciation study and associated expense was post-test period, citing ARM 38.5.106. MCC also cited a recent Commission order addressing this matter. Order No. 5331, dated February 23, 1988, Finding No. 34. Similarly, MCC objected to the Commission's request for testimony on the tax settlements, noting it appeared that the expenses and/or credits associated with these matters would not be booked until 1989. MCC argued that its position was supported by the matching principle.

14. In its response to MCC's exceptions, MPC moved the Commission for a waiver of ARM 38.5.106, as it related to the updated depreciation expense, the effects of the recent tax settlements, and the Toston Dam qualifying facility payments. The grounds for this motion were as follows: the extended procedural schedule allowed for full exploration of these issues; the adjustments were substantial; there was no serious danger of violating the matching principle, and; in the Toston Dam issue, the Commission had approved a tracking mechanism which would allow for reflection of this cost in rates without filing a full general rate case. MPC stated that such a waiver was supported by Commission precedent, citing Docket No. 83.9.67, Order No. 5051c. Further, MPC stated that if the Commission refused to waive the rule, MPC would have to immediately file another general rate change request.

15. On reply, MCC argued that the integrity of the “test period” concept was at issue, adding:

The most glaring problem with the Company’s proposal is that only certain select items are to be considered. All the time in the world would not make this situation fair, unless the Commission allows intervenors the opportunity to update all expense and revenue items through the first quarter of 1989.

MCC Reply at p. 2. MCC further noted that MPC “substantiality” argument only represented one view of what changes were, in fact, “substantial.” MCC also emphasized the importance of the matching concept, stating that such a principle prevents skewed rates which could result from picking and choosing expenses or revenues. Finally, MCC contended that Order No. 5051c offered no precedent for MPC’s position, but rather supported application of the “test period” concept embodied in the Commission’s rules.

16. On exceptions, the Commission agrees with MCC, and reverses the determinations made by the hearings examiner in regard to these matters. The Commission denies MPC’s request for a waiver of ARM 38.5.106. Accordingly, the updated depreciation expense for the gas and electric utilities (and testimony and exhibits relating thereto), the testimony and exhibits relating to the recent settlement of several disputed tax issues (filed since the issuance of the proposed order), and the testimony and exhibits concerning the Toston Dam payments, should be stricken from the record, with no further consideration in this docket.

17. As MCC correctly notes, the test period concept, embodied in ARM 38.5.106, is based, at least in part, upon the matching principle. The matching concept is often applied to changes in costs that are directly tied to other cost or revenue changes. However, the matching principle and test period concept also allows for equal footing by

looking at all expenses and revenues during the same time period. This, of course, protects against the possibility that expense increases are allowed when unrelated, but nonetheless offsetting expense decreases or revenue increases are ignored. As noted by MCC, the discussion and circumstances surrounding Order No. 5051c (Docket No. 83.9.67) actually supports the Commission's conclusions in this order.

18. MCC is also correct when it notes the Commission's historical resistance to "single issue" rate cases. The rationale behind such a reluctance is, of course, premised upon much of the same analysis described above. See Order No. 5398, Finding No. 7 (March 3, 1989). In the past, the consideration of "single issue" filings has been based upon certain unique circumstances, not the least of which is the opportunity to examine all of the company's operations prior to Commission approval.

19. In its response to MCC's exceptions, MPC noted that if the Commission refused to waive ARM 38.5.106, MPC might have to file another rate change request to have these items reflected in rates. As unwieldy as this may seem, the Commission believes it is the proper result under these circumstances, given the important policy reasons underlying the matching principle and test period concept. However, the Commission does not wish this determination to be unduly burdensome upon MPC. With any new filing made by MPC to address these issues, the Commission will entertain a motion to waive certain of the minimum filing requirements. Although the Commission envisions that this next filing will contain only a few items, and does not intend to reject the filing on that basis, the Commission will not seek to limit the ability of interested parties to raise other issues which may also be pertinent. It will still be important for

interested parties, as well as the Commission staff, to have the opportunity to examine all of MPC's operations through discovery and audit.

### PROCEDURAL ORDER

20. Given the disposition of the pending motions, as described above, it is necessary for the Commission to establish a procedural order to govern the remainder of this proceeding.

21. Hereafter in this order, the term "parties" includes the Applicant, Montana Power Company (MPC), and all intervenors, Individuals or entities listed on the "Service List" for these dockets are not "parties" to these dockets unless they have been granted intervention by the Commission.

22. Copies of all pleadings, motions, discovery requests, prefiled testimony and briefs filed with the Commission shall be served on all parties to these dockets. A copy of a cover letter or transmittal letter describing the filing shall also be served on the remainder of the "service list" who are not parties to these dockets. In submitting prefiled testimony, the original and ten copies must be filed with the Commission. Failure to provide the requisite number of copies will constitute a defective filing and may result in the testimony not being allowed into the record.

23. All dates listed in the following schedule are mailing dates. Parties must mail all material by the most expeditious method available at reasonable cost. In choosing the "most expeditious method available," the parties should be cognizant of the obligations imposed upon other parties by the following schedule.

### Schedule

24. Unless otherwise herein specified, the following schedule shall apply in Docket Nos. 88.6.15, 88.7.26 and 88.8.25:

- (a) February 1, 1989: Final day for service of rebuttal testimony by MPC and other parties (to initial direct testimony of all parties except MPC) . Final day for service of supplemental testimony of parties other than MPC, in response to MPC testimony filed pursuant to paragraph 4 (c) of the Consolidation and Procedural Order dated September 2, 1988, as amended.
- (b) February 28, 1989: Final day as a matter of right for written discovery and data requests directed to all parties regarding testimony filed pursuant to Paragraph 17(a).
- (c) March 14, 1989: Final day for service of answers by all parties to discovery and data requests made pursuant to Paragraph 17(b).
- (d) March 28, 1989: Final day for completion and service upon MPC and other parties of the prepared testimony and exhibits of all parties except MPC, addressing those aspects of MPC's rebuttal testimony which are subject to further discovery and testimony as indicated by this order.
- (e) April 7, 1989: Final day as a matter of right for written discovery and data requests directed to all parties by MPC and intervenor data requests directed to parties other than MPC (except as to additional rebuttal testimony noted below).

- (f) April 21, 1989: Final day for completion of answers by all parties to discovery and data requests made pursuant to paragraph 17 (e).
- (g) May 4, 1989: Final day for service of rebuttal testimony by MPC and other parties to testimony filed pursuant to paragraph 17(d).
- (h) May 10, 1989: Final day as a matter of right for written discovery and data requests directed to all parties regarding testimony filed pursuant to paragraph 17 (g)
- (i) May 17, 1989: Final day for service of answers by all parties to discovery and data requests made pursuant to paragraph 17(h).
- (j) May 22, 1989: Opening day of hearing. A prehearing conference may be scheduled in the morning prior to the beginning of the hearing, if necessary. Four days have been scheduled for this week.
- (k) June 5, 1989: Continuation of hearing.

#### Supplemental Evidence

25. May 10, 1989, is the final day for any party which intends to introduce as evidence, data requests or other discovery as part of its basic case, to notify all parties in writing of the specific data requests or other discovery it plans to so introduce. Similar opportunities will be provided on the opening day of the hearing, May 22, 1989, and at the continuation of the hearing, June 5, 1989, for discovery subsequently received.

#### Intervention

26. Parties seeking to intervene must file a Petition to Intervene with the Commission. The petition shall demonstrate (A) the position that the intervenor will take

if the intervention is granted, (b) that the proposed intervenor has an interest in and is directly affected by this Docket, (C) that the intervention, if granted, will not delay or prejudice the proceeding in these Dockets, and (D) good cause why the petition was not timely filed. (ARM Section 38.2.2401, et sea.)

### Discovery

27. The term “discovery” as used in this order includes all forms of discovery authorized by the Montana Rules of Civil Procedure, as well as informal “data requests.” The Commission urges all parties to conduct their discovery as much as possible through the use of data requests.

28. Written discovery and data requests will be served on all parties. Hopefully, this will serve to reduce the number of duplicate requests. Unless otherwise agreed between individual parties, copies of answers to all written discovery and data requests will be served only on parties specifically requesting them and on the Commission. In this connection, the term “parties” includes the parties, their attorneys, and witnesses testifying on matters to which the answers related, who are not located in the same town as the party. If any party wants material requested by any other party, it should so inform the party to whom the data requests or written discovery was directed.

29. Parties receiving written discovery or data requests have five (5) days from receipt of the same, or until a response is due, whichever is less, within which to voice any objections to the request. The objection and notice thereof shall be served upon the Commission and all parties of record, The Commission may dispose of such objections by prompt ruling, or may schedule arguments on the objections. Failure to object promptly will be deemed acceptance of the requests.

30. In the event any requesting party is dissatisfied with the response to any written discovery or data request, such party must, within five (5) days after receipt of such response, serve in writing upon the Commission, and simultaneously upon all parties of record, its objections to such response. Parties must answer all data requests in a full and complete fashion. Unless the two data requests are the same question; the bare reference in a response to another data request response will be deemed unresponsive. Attachments that have been submitted in response to a previous request may be incorporated into subsequent responses by reference if the prior response and attachment have been submitted to all parties. The Commission may dispose of any objections by prompt ruling, or may schedule argument on the objections. The Commission will issue its order either sustaining or overruling the objections. If objections are sustained, a time period will be set within which a satisfactory response must be made.

31. Submission of written discovery or data requests after the period established for the same may be allowed by leave of the Commission. Such requests will not be permitted unless the party making the request shows good cause as to why the requests were not submitted within the time period allowed.

32. Unless excused by the Commission, failure by a party to answer data requests or other discovery from any party may result in:

- (a) An order refusing to allow the disobedient party to support or oppose related claims, or prohibiting him from introducing related matters in evidence;

- (b) An order striking pleadings, testimony or parts there of, or staying further proceedings until the request is satisfied, or dismissing the action or proceeding or any part thereof.

33. Because the Commission staff will not file testimony, it will not be subject to discovery deadlines. Responses to staff data requests must be provided within fourteen (14) days of receipt, unless otherwise agreed.

#### Testimony and Evidence

34. The Commission contemplates a progressive narrowing of issues as this proceeding progresses. Introduction of new issues will be carefully scrutinized and disallowed unless reasonably related to issues which are to be addressed during the extended portion of this proceeding.

35. At the hearing, all prefiled testimony will be adopted into the record without the need of recitation by the witness. This procedure will eliminate retyping of prepared testimony into the hearing transcript.

36. All proposed exhibits and prefiled written testimony shall be marked for the purposes of identification prior to the start of the hearing. Parties shall arrange in advance with the court reporter the manner of identifying their exhibits.

37. When cross-examination is based on a document, not previously filed with the Commission, copies of the document will be made available to the Commission unless good cause is shown why copies are not available. Parties introducing data requests or other discovery must have copies of each request and response available at the hearing for the court reporter, each Commissioner, the Commission staff and all parties.

38. Parties may be permitted to present “live” rebuttal testimony only if it is in direct response to an issue raised for the first time in cross-examination of a witness or the testimony of a public witness. Such testimony will be allowed only by leave of the presiding officer.

39. Citizens and citizen groups will, in the discretion of the Commission, be allowed to make statements without having submitted prepared written testimony; in addition, if they have prepared written testimony they may read it if they desire, or they may have it adopted directly into the record.

40. The rules of evidence applicable in the District Courts of the State of Montana at the time of the hearings in this Docket will be used at the hearings.

#### Prehearing Motions and Conferences

41. Motions by any party, including motions to strike prefiled testimony and motions concerning any procedural matter connected with the docket shall be raised at the earliest possible time. Prehearing motions shall be submitted on briefs unless otherwise requested by a party. If oral argument is requested, and the request is granted, the party requesting oral argument shall notice the same for hearing before the Commission.

42. The Commission may, at any time prior to the hearing, set a final Prehearing Conference. At that prehearing conference there may be discussed, among other things, the feasibility of settlement of any issues in the proceeding, simplification of issues, possibility of obtaining admissions of fact and documents, the distribution and marking

of written testimony and exhibits prior to the hearing, and such other matters as may aid in the disposition of the proceeding or settlement thereof.

43. Nothing in this order shall be construed to limit the legally established right of the Commission or its staff to inspect the books and accounts of MPC at any time.

Proposed Settlements

44. The parties are encouraged to tender proposed stipulations to the Commission by April 15, 1989, in order to allow for a sufficient amount of time to review the same prior to hearing.

Done and DATED this 13th day of March, 1989 by a vote of 4 - 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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CLYDE JARVIS, Chairman

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HOWARD L. ELLIS, Commissioner

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WALLACE W. "WALLY" MERCER, Commissioner

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DANNY OBERG, Commissioner

ATTEST:

Ann Purcell

Acting Commission Secretary

(SEAL)